ST 98-39
Tax Type: SALES TAX
Issue: Disallowed Resale Deduction (No Valid Certificates)
Non-Filer (Failure To File Returns - Extends Limit)

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

DEPARTMENT OF REVENUE	)	
STATE OF ILLINOIS	)	97-ST-0000
	)	0000-0000
v.	)	NTL #SF-199700000000000
	)	SF-199700000000001
"AT'S A NICE FLOWERS, INC.",	)	Mimi Brin
	)	Administrative Law Judge
Taxpayer	)	

RECOMMENDATION FOR DISPOSITION

Appearances: Alan P. Jacobus, for "At's A Nice Flowers, Inc."; Mark Dyckman, Special Assistant Attorney General, for the Illinois Department of Revenue

Synopsis:

This matter comes on for hearing pursuant to the timely protest of "At's a Nice Flowers, Inc." (hereinafter referred to as the "Taxpayer" or "At's a Nice"), to Notice of Tax Liability SF 199700000000000 (hereinafter referred to as the "NTL") issued by the Illinois Department of Revenue (hereinafter referred to as the "Department) pursuant to the Retailers' Occupation Tax Act, 35 **ILCS** 120/1 *et seq*. (hereinafter referred to as the "ROTA" or the "Act"), for the period of April 1, 1988 through March 31, 1994

(hereinafter referred to as the "tax period"). At issue is whether taxpayer is a wholesaler of silk flowers, and therefore not amenable to the record keeping requirements of the ROTA or, whether its retail sales activity subject it to those provisions.

Findings of Fact:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, was established by the admission into evidence of the Corrections of Returns, as well as revised Corrections of Returns, for the tax period of April 1, 1988 through March 31, 1994. Department Gr. Exs. 1, 2
2. Taxpayer was in the business of selling silk flowers, etc. Tr. p. 18
3. Taxpayer did not obtain any resale or certificates from its customers during the tax period. Tr. pp. 28-29
4. Taxpayer maintained some invoices, with customer names and addresses on them, for sales it made during the tax period. Tr. pp. 28-29, 38 Taxpayer provided the Department with a box of invoices, which the Department used as the representation of taxpayer's sales during the audit period. Tr. pp. 28-29 These invoices represented $200,206.06 worth of sales. Taxpayer Ex. No. 1
5. The Department gave credit to taxpayer for those invoices showing sales made to customers with active registration numbers whose businesses were registered as being affiliated with reselling or as being in the florist business. Tr. pp. 29-30

6. While the matter was pending in administrative hearings, the Department conducted two reaudits of the taxpayer for the tax period. Tr. pp. 31-33, 48

7. During these reaudits, taxpayer provided the Department with resale certificates it got from customers for purposes of these proceedings. Taxpayer Ex. No. 2; Tr. pp. 31-33, 41-44, 48, 55-56

8. The Department gave credit to the taxpayer for all resale certificates received which provided valid business or resale numbers on the date of the sale shown on the invoice, and the Department revised its assessment accordingly. Department Ex. No. 3; Tr. pp. 52-54, 61

9. Taxpayer does not challenge the amount shown due on the revised assessment should it be determined that it must comply with the provisions of the Act. Tr. p. 60

10. Taxpayer is primarily a wholesaler of tangible personal property. Tr. p. 65

11. Taxpayer made retail sales during the tax period, which sales were not as accommodation or good will sales to its regular customers. Tr. pp. 37, 39, 40

12. Taxpayer paid no Retailers' Occupation Tax (hereinafter referred to as "ROT") on those retail sales. Department Ex. No. 3

13. These retail sales were at least 7.5% of the provided, invoice sales, which totaled $200,206.06. Tr. pp. 51-58; Department Ex. No. 3; see, footnote 1, *infra*

Conclusions of Law:

The Department issued a Notice of Tax Liability against "At's a Nice" for Retailers' Occupation Tax for the tax period of April 1, 1988 through March 31, 1994 for retail sales of tangible personal property made by the taxpayer. Department Group Ex. No. 1 During these administrative proceedings, the Department conducted two reaudits, revising the initial NTL. Department Group Ex. No. 2

The basis of the Department's assessment is that taxpayer made sales at retail and did not remit ROT on those transactions. The Department made its determination by examining invoices provided by the taxpayer for the tax period, checking whether the purchasers had active business registration numbers or resale numbers. Invoices were the only documentation kept by taxpayer of its customers and sales. It kept no resale certificates or other written documentation from its customers verifying that purchases were for resale. Where the Department found no record of the invoiced purchaser having an active registration number or resale number with the Department, the sale was concluded as being at retail with ROT being due.

During two reaudits, the Department afforded the taxpayer the opportunity to obtain resale certificates or other information from its purchasers showing that the transactions were for resale, and, therefore, not amenable to ROT. Taxpayer was given credit for all proper documentation presented, and taxpayer agrees that if ROT is applicable, the revised determination (Department Group Ex. No. 2) is correct.[1]

[1] Department Ex. No. 3 is the compilation of taxable sales made by the Department following the submission of all resale documentation. Tr. pp. 51-56 When credit is given to taxpayer for all sales for which it provided resale documentation, even if valid registration numbers did not exist at the time of the sale, retail sales accounted for $15,069.72 of total invoices of $200,206.06. This calculates to approximately 7.5%. If taxpayer is not given credit for resale certificates provided which are not valid, the taxable sales amount to $23,676.06, or 11.8%.

"At's a Nice" defends against the assessment by asserting that it is a wholesaler of tangible personal property, and the ROTA's record keeping requirements do not apply to it. Consequently, it owes no ROT on the sales it concedes were at retail. In support of its position, taxpayer relies on Dearborn Wholesale Grocers, Inc. v. Whitler, 82 Ill.2d 471 (1980) and Illinois Cereal Mills, Inc. v. Department of Revenue, 99 Ill.2d 9 (1983). The Department relies on Illinois Cereal Mills, Inc. as well as Tri-America Oil Co. v. Department of Revenue, 102 Ill.2d 235 (1984) to support its assessment.

Indeed, the facts of this instant matter do not fall neatly within any of the cases cited. To begin, section 2 of the ROTA provides, in pertinent part, that "[A] tax is imposed upon persons engaged in the business of selling at retail tangible personal property… ." 35 **ILCS** 120/2[2] The Act further defines "Sale at retail" as "…any transfer of the ownership of or title to tangible personal property to a purchaser, for the purpose of use or consumption, and not for the purpose of resale … ." 35 **ILCS** 120/1 "Sale at retail" is further defined:

> …to include any transfer of the ownership of or title to tangible personal property to a purchaser, for use or consumption by any other person to whom such purchaser may transfer the tangible personal property without a valuable consideration, and to include any transfer, whether made for or without a valuable consideration, for resale in any form as tangible personal property unless made in compliance with Section 2c of this Act.

Id. Additionally, "Purchaser" is defined to mean "anyone who, through a sale at retail, acquires the ownership of or title to tangible personal property for a valuable consideration. *Id.* The definitions section of the ROTA also reads:

[2] The tax period at issue is from April 1, 1988 through March 31, 1994. Effective January 1, 1993, the ROTA has been found at 35 **ILCS** 120/1 *et seq*. (P.A. 87-1005) Prior to that date, the Act was at Ill. Rev. Stat. ch. 120, par. 440 *et seq*. I use the current citation form in this recommendation, unless the statutory provision differed during the tax period.

> [t]he isolated or occasional sale of tangible personal property at retail by a person who does not hold himself out as being engaged (or who does not habitually engage) in selling such tangible personal property at retail…does not constitute engaging in a business of selling such tangible personal property at retail within the meaning of this Act… .

Id.

The ROTA also sets forth record keeping requirements. Initially, the Act provides, in pertinent part:

> It shall be presumed that all sales of tangible personal property are subject to tax under this Act until the contrary is established, and the burden of proving that a transaction is not taxable hereunder shall be upon the person who would be required to remit the tax to the Department if such transaction is taxable.

35 **ILCS** 120/7 Further, section 7 states that:

> Every person engaged in the business of selling tangible personal property at retail in this State shall keep records and books of all sales of tangible personal property, together with invoices, bills of lading, sales records, copies of bills of sale… . Every person who is engaged in the business of selling tangible personal property at retail in this State and who, in connection with such business, also engages in other activities (including, but not limited to, engaging in a service occupation) shall keep such additional records and books of all such activities as will accurately reflect the character and scope of such activities and the amount of receipts realized therefrom.

Id. Finally, that statutory provision mandates that:

> To support deductions made on the tax return form, or authorized under this Act, on account of receipts from isolated or occasional sales of tangible personal property…entries in any books, records or other pertinent papers or documents of the taxpayer in relation thereto shall be in detail sufficient to show the name and address of the taxpayer's customer in each such transaction, the character of every such transaction, the date of every such transaction the amount of receipts realized from every such transaction and such other information as may be necessary to establish the non-taxable character of such transaction under this Act.

Id.

Taxpayer argues that all but a *de minimus* amount of its sales are for resale. As provided in section 2c of the Act:

> …a sale shall be made tax-free on the ground of being a sale for resale if the purchaser has an active registration number or resale number from the Department and furnishes that number to the seller in connection with certifying to the seller that any sale to such purchaser is nontaxable because of being a sale for resale.
>
> Failure to present an active registration number or resale number and a certification to the seller that a sale is for resale creates a presumption that a sale is not for resale. This presumption may be rebutted by other evidence that all of seller's sales are sale for resale, or that a particular sale is a sale for resale.

35 **ILCS** 120/2c Taxpayer avers that because virtually all of its sales are for resale, it is not a retailer, as defined in the ROTA, and, therefore, not amenable to the Act's record keeping mandates. Consequently, although it admits that sales were made to non-reselling purchasers, it is not required to remit ROTA on those sales.

The Illinois Supreme Court has addressed the issue of whether a wholesaler of tangible personal property is amenable to the record keeping requirements of section 2c, cited above, and taxpayer relies on these cases for its positions. First, the Department conducted a field audit of the taxpayer in Dearborn Wholesale Grocers, Inc. v. Whitler, 82 Ill.2d 471 (1980) and assessed it tax pursuant to the ROTA on about 1.5% of its gross receipts. During neither the audit nor the administrative hearing on the assessment, did the taxpayer produce any certificates from its customers that the items purchased were for resale. The plaintiff did introduce, at hearing, affidavits by its salesmen that all new accounts completed taxpayer's form stating that all merchandise purchased from taxpayer was for resale. The forms also included purchasers' registration or resale number. This

evidence was not controverted by the Department, and the hearing officer concluded that taxpayer was a wholesale grocer, with all of its sales being for resale. *Id*. at 478 However, because the taxpayer did not have the resale certificates as required by section 2c, the hearing officer upheld the liability. The Illinois Supreme Court reversed, stating, *inter alia*, that the ROTA was not directed to transactions by an entity whose transactions are all wholesale in nature. By its facts, then, Dearborn is distinguishable from the instant matter, wherein the taxpayer admits that some of its sales were not to its resale customers.

Dearborn was followed by Illinois Cereal Mills, Inc. v. Department of Revenue, 99 Ill.2d 9 (1983). In that case, Illinois Cereal Mills acknowledged making retail "accommodation sales made for good-will purposes" to its regular customers. *Id*. at 13; see, also, Tri-America Oil Co. v. Department of Revenue, 102 Ill.2d 234, 239 (1984) These sales were approximately .66% of its gross sales. Illinois Cereal Mills conceded its liability to the Department for the ROT tax due on those sales, but contested the remaining claimed liability for those other sales for which it did not have resale documentation. It asserted that those remaining sales assessed were for resale, and, in its opinion, the appellate court determined that Illinois Cereal Mill's evidence "'showed conclusively'" "that the property sold in the questioned sales was resold by the buyers." Illinois Cereal Mills, *supra* at 19

In that case, the Department acknowledged that the ultimate users or consumers of the property sold which remained at issue were not to "purchasers" as defined by the ROTA. *Id*. at 18 Rather, it averred that the tax applied because that taxpayer did not have the documentation required under section 2c to support the resale nature of the

transactions. Again, based upon those facts, the Supreme Court found for the taxpayer, holding that section 2c did not apply to Illinois Cereal Mills, a wholesaler with minute retail sales made for accommodation and good will purposes to its regular customers.

But, these are not the facts before me. First, taxpayer's position is that it does not owe any monies, even for those sales which it concedes were retail in nature whereas, Illinois Cereal Mills admitted its ROT liability for its retail sales, regardless of the purpose of those sales. In addition, there was a specific finding in Illinois Cereal Mills, with no quarrel from the Department, that the remaining sales at issue were to resellers, with liability imposed because of lack of the resale certificates as required by section 2c.

In this instant matter, there is no such concession by the Department, nor is there evidence of record for me to make a finding that any of the sales at issue were to resale customers of "At's a Nice". Therefore, I am unable to conclude that the "purchasers" of the sales at issue herein were not as defined in the ROTA.

In support of its assessment, the Department compares "At's a Nice" with the taxpayer in Tri-America Oil Co. v. Department of Revenue, 102 Ill.2d 234 (1984) However, this comparison has its problems. In Tri-America, the taxpayer was both a wholesale and retail seller of gasoline. It openly operated three gas stations from which it sold gasoline to the general public. The Department assessed ROT on the substantial sales Tri-America made, regularly, to a particular customer. That customer never had a resale number to give to Tri-America on its purchases. The court also stated that it was clear that no taxes were paid on that gasoline. *Id*. at 236

The Tri-America court distinguished the facts before it from both Dearborn and Illinois Cereal Mills on several key points. First, unlike Dearborn and Illinois Cereal

Mills, which were determined to be wholesalers, only, Tri-America held itself out to the public as a retailer. Secondly, the sales at issue in Tri-America were regular and frequent, and not made to one of Tri-America's wholesale customers for accommodation or good-will purposes. The court concluded that:

> …section 2c applies to whatever sales Tri-America made to Chavez, and that it cannot avoid paying the retailers' occupation tax on those sales because it has failed to demonstrate that it obtained a registration number or sales number assigned to Chavez by the Department of Revenue or that Chavez paid any tax on sales of gasoline he purchased from Tri-America.

Id. at 241

Taxpayer distinguishes itself from Tri-America by, *inter alia*, directing attention to the fact that the sales herein assessed account for less than 1% of its gross sales, as was the case in Illinois Cereal Mills. First, taxpayer's assertion regarding the percentage at issue is incorrect. The Department auditor's workpapers were not placed into evidence. She testified that the invoices she saw, which form the basis of her sample, are those given to her by the taxpayer. These totaled $222,206.06 worth of sales. Tr. pp. 28-29 After allowing those sales made to entities with active registration numbers or were registered with the Department as resellers, the auditor applied the percentage of sales which remained, 15%, to line one of taxpayer's federal income tax return.[3] Tr. pp. 29-30 The auditor then applied the tax rate for the time period at issue to arrive at a tax due. Tr. pp. 30-31 After the two reaudits, the invoices which remained as representing retail sales were reduced to $15,069.72 of the original $200,206.06 sample. This computes to 7.5% retail sales.[4]

[3] Taxpayer's federal returns were also not admitted into evidence.

[4] The record is confusing as to percentages of retail sales remaining after the reaudits. During direct examination by Carol's counsel, the auditor attempted to pick out of Taxpayer's Ex. 1 all of the remaining

All of this aside, the appellate court in Elkay Manufacturing Co. v. Sweet, 202 Ill. App.3d 466 (1st Dist. 1990) did not find a numbers argument persuasive. In the Elkay matter, the sales assessed were made to Hinckley & Schmitt, and, in fact, consisted of all the sales made to that customer. *Id*. at 475 In addressing Elkay's assertion that "as a wholesaler whose retail sales comprise a minute portion of its total sales, it is not subject to the ROT Act's tax upon the business or occupation of selling at retail, even on its retail sales" (*id*. at 473), the court stated:

> …supreme court case law indicates that the inquiry into whether a business is engaged in the business of retail is not limited to consideration of the percentage of retail sales made by the business.

Id. at 475 Rather, the court focused on the nature of the sales made, by contrasting Elkay's retail sales to Illinois Cereal Mills', that were made to its wholesale customers for good-will or accommodation purposes. The Elkay court concluded that "[w]ithout any evidence to the contrary, it can only be concluded that plaintiff held itself out to its retail customers as a retailer by selling its products on a regular, retail basis" (*id*.) and that it was Elkay that had failed to prove otherwise. *Id*. at 476

It is clear from all of the above that "At's a Nice" is unlike Tri-America in that it did not make retail sales in so visibly a manner. Yet, it made retail sales that were not to its regular customers for good-will or accommodation purposes. And, although these sales were not the majority of its business, they occurred throughout the tax period.

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retail sales. This appeared to represent less than 1% of the invoices representing the sample. Tr. pp. 21-27 However, during examination by Department's counsel, the auditor testified that Department Ex. 3 and the notations thereon, represented the latest determination of taxable sales. Tr. pp. 51-53 It is from this document, and the testimony relating to it, that I base my finding that "At's a Nice's" retail sales were, at the least, 7.5% of its sales.

The purpose of the registration and record keeping provisions of the ROTA are to assure that the Department can get an accounting of retail sales and the tax required to be paid over to the State as a result of them. As a consequence of the retail sales at issue herein, for which no sales tax was collected, taxpayer's purchasers have reaped an advantage over all other retail buyers who purchase the same tangible personal property and pay the required sales tax, which is then remitted to the State via the ROT paid by the retailer.[5] Additionally, "At's a Nice" has reaped a benefit in that it made retail sales of tangible personal property to "purchasers" and not for resale, at prices below what retailers sold the same items, because it did not add tax to its sales price, as retailers are required to do. 35 **ILCS** 105/3-45 These scenarios are what the taxing statutes are designed to prevent.

The Department's corrected return is deemed to be *prima facie* correct and to be *prima facie* evidence of the correctness of the amount of tax due. Illinois Cereal Mills, Inc. v. Department of Revenue, 99 Ill.2d 9 (1983) Once the return is admitted into evidence, the burden shifts to the taxpayer to overcome this evidence by showing that the transactions at issue are nontaxable. *Id*. Taxpayer can do this by either showing compliance with section 2c or by showing that this record keeping section is not applicable to it. Tri-America Oil Co. v. Department of Revenue, 102 Ill.2d 234, 240 (1984)

[5] I note, again (*supra* at 8, 9), that although it averred that as a wholesaler, it was not bound by the recordkeeping requirements of section 2c of the ROTA, Illinois Cereal Mills conceded that it owed ROT on those retail sales it made to its regular customers for good-will or accommodation purposes.

"At's a Nice" has failed to do either. Obviously, it did not comply with section 2c in that the transactions assessed were those to entities for which no proper registration or resale number existed. It has also failed to show that it did not have to comply with the mandates of section 2c, in that these sales were at retail, made throughout the tax period, were not to its regular purchasers made for good will or accommodation purposes and, there is no evidence presented that either use tax or ROT was ultimately paid to the State on those purchases.

WHEREFORE, for the reasons stated above, it is my recommendation that the Notice of Tax Liability at issue herein be finalized, as revised by the Department.

11/12/98

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Mimi Brin
Administrative Law Judge